

BEFORE THE
POLLUTION CONTROL HEARINGS BOARD
STATE OF WASHINGTON

IN THE MATTER OF SURFACE WATER)
APPLICATION NO. S2-20439)
ALMA BOGSTAD, JAMES D. BOGSTAD,)
MABLE A. DEBOLT and PEARL M.)
JONES,)
Appellants,)
v.)
STATE OF WASHINGTON,)
DEPARTMENT OF ECOLOGY and)
JOHN D. SHARP and THOMAS)
CROSS, JR.,)
Respondents.)

PCHB No. 539

FINAL FINDINGS OF FACT,
CONCLUSIONS OF LAW
AND ORDER

THIS MATTER being an appeal from a decision of the Department of Ecology conditionally granting respondents' surface water application; having come on regularly for hearing before the Pollution Control Hearings Board on the 26th day of September, 1974, at Lacey, Washington; and appellants, Alma Bogstad, James D. Bogstad, Mable A. Debolt and Pearl M. Jones, appearing through their attorney, Thomas M. Baker, and

1 respondent, Department of Ecology, appearing through Wick Dufford, Assistant
2 Attorney General and respondents, John D. Sharp and Thomas Cross, Jr.,
3 appearing through Thomas Cross, Jr., pro se; and Board members present
4 at the hearing being W. A. Gissberg (presiding) and Chris Smith and the
5 Board having considered the sworn testimony and read the transcript of
6 that portion of the hearing at which Mrs. Smith was not personally
7 present, records and files herein and having entered on the 3rd day of
8 December, 1974, its proposed Findings of Fact, Conclusions of Law and
9 Order, and the Board having served said proposed Findings, Conclusions
10 and Order upon all parties herein by certified mail, return receipt
11 requested and twenty days having elapsed from said service; and

12 The Board having received no legally sufficient statement of
3 exceptions to said proposed Findings, Conclusions and Order, now
14 therefore,

15 IT IS HEREBY ORDERED, ADJUDGED AND DECREED that said proposed
16 Findings of Fact, Conclusions of Law and Order, dated the 3rd day of
17 December, 1974, and incorporated by this reference herein and attached
18 hereto as Exhibit A, are adopted and hereby entered as the Board's
19 Final Findings of Fact, Conclusions of Law and Order herein.

20 DONE at Lacey, Washington, this 21st day of January, 1975.

21 POLLUTION CONTROL HEARINGS BOARD

22
23 W. A. Gissberg
24 W. A. GISSBERG, Member

25
26 Chris Smith
27 CHRIS SMITH, Chairman

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CERTIFICATION OF MAILING

I, LaRene Barlin, certify that I deposited in the United States mail, copies of the foregoing document on the 22nd day of January, 1975, to each of the following-named parties, at the last known post office addresses, with the proper postage affixed to the respective envelopes:

Mr. Wick Dufford
Assistant Attorney General
Department of Ecology
St. Martin's College
Olympia, Washington 98504

Mr. Thomas M. Baker, Jr.
Attorney at Law
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Mr. John D. Sharp
12831 Spanaway Loop Road
Tacoma, Washington 98444

Mr. Thomas Cross, Jr.
12823 Spanaway Loop Road
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Alma and James D. Bogstad
1610 Tule Lake Road
Tacoma, Washington 98444

Ms. Mable A. DeBolt
1310 S. Violet Meadow
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Ms. Pearl M. Jones
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FINAL FINDINGS OF FACT,
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AND ORDER

LaRene Barlin
LARENE BARLIN
POLLUTION CONTROL HEARINGS BOARD

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STATE OF WASHINGTON

IN THE MATTER OF SURFACE WATER)
APPLICATION NO. S2-20439)

ALMA BOGSTAD, JAMES D. BOGSTAD,)
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PEARL M. JONES,)

Appellants,)

v.)

STATE OF WASHINGTON,)
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FINDINGS OF FACT,
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A formal hearing on the appellants' appeal from a decision of the Department of Ecology (hereinafter Department) conditionally granting respondents' surface water application was held before Board members W. A. Gissberg (presiding) and Chris Smith, in Lacey, Washington on September 26, 1974.

Appellants appeared by and through their attorney, Thomas M. Baker,

EXHIBIT A

1 Jr.; the Department appeared by and through Wick Dufford, Assistant
2 Attorney General; respondents, Sharp and Cross, appeared by and through
3 Thomas Cross, Jr., pro se.

4 Having heard the testimony and read the transcript of that portion
5 of the hearing at which Mrs. Smith was not personally present and being
6 fully advised the Board makes these

7 FINDINGS OF FACT

8 I.

9 Spanaway Creek originates from Tule Lake (Pierce County) and flows
10 through appellants' property, thence through the property of one Brandt;
11 thence across the property of respondents Sharp and Cross before flowing
12 into Clover Creek. The creek gradually diminishes in size from the time
13 it leaves the lake until its confluence with Clover Creek. During the
14 summer months, Spanaway Creek (hereinafter Creek) has historically been
15 dry at its confluence with Clover Creek. The Creek, between Tule Lake
16 and the Spanaway Loop Road has dried up at least twice during its low
17 water periods. The volume of water in the Creek, over the years, has
18 decreased in the vicinity of appellants' property. The distance from
19 Tule Lake, along the Creek through appellants' property to Brandt's
20 property is less than 1,000 feet.

21 II.

22 The only existing recorded water right was issued for the Brandt's
23 property (downstream from the proposed diversion which is the subject of
24 this appeal) for 0.045 cubic feet per second (cfs-20 gallons per minute)
25 which is used for circulation waters for two ponds for esthetic purposes.

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1 III.

2 A large sealed pond has existed on respondents' property (north of
3 the Creek) since prior to 1917. It is approximately 140 feet by 80 feet
4 in size and four feet deep and retains water therein the year around.
5 Its source of water supply is from surface water and seepage from the
6 Creek, and, historically the pond received water directly by pipeline
7 from the Creek until 1972. The pipeline crosses appellants' property and
8 in 1972 one of the appellants shut the "gate" on the pipeline from the
9 Creek to the pond, but water nonetheless still remains in the pond.

10 IV.

11 The waters of the pond have been used for many years for swimming
12 and fishing but at the present time there is no circulation of water
13 therein. Respondents Sharp and Cross applied for and, after investigation
14 by the Department, were granted by Order of the Department, the
15 conditional right to divert 0.05 cfs (22 gallons per minute) from the
16 Creek on appellants' property to the pond on respondents' property.
17 In order to circulate the water in the pond, respondents' plan is to
18 construct a pipeline to receive the water from the pond and carry it
19 across their property and then back into the Creek at a point downstream
20 from the original point of diversion.

21 V.

22 The State ordered the permit to be conditioned so as to require
23 respondents to install a water diversion box so that the diversion of
24 the water would cease when the flow of the Creek recedes to 0.25 cfs
25 (112 gallons per minute), or less. The maximum diversion of water from
26 the Creek (on appellants' property downstream from the point of diversion)

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1 would be 0.05 cfs.

2 VI.

3 Appellants make no use of the water of the Creek. There are no
4 other recorded water rights or any other diversions of water between
5 the point of respondents' proposed diversion and the Brandt diversion
6 under his water right.

7 VII.

8 The Department determined, after investigation of the application,
9 that: (1) when the water of the Creek at the point of diversion exceeds
10 0.25 cfs the amount of water there available for appropriation is .05 cfs;
11 (2) such appropriation would not impair existing rights; (3) the
12 appropriation would be applied to a beneficial, non-consumptive use, i.e.,
13 recreation and beautification, and (4) the appropriation would not
14 detrimentally affect the public welfare.

15 Appellants presented no evidence to contradict the Department's
16 determinations. The Department established that respondents'
17 appropriation would result in the diminution of the Creek water, down-
18 stream along appellants' property, from the point of diversion to its
19 re-entry, in the amount of 0.05 cfs when the water of the Creek exceeds
20 0.25 cfs.

21 VIII.

22 Neither the Departments of Game nor Fisheries object to the
23 appropriation. The Department has a general policy of maintaining
24 minimum base flows and this policy is met by allowing a diversion only
25 when there are sufficient waters (a minimum of 0.25 cfs) available.

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IX.

The proposed use of the water is non-consumptive, except to the extent of evaporation loss. In other words, except for evaporation loss, what is taken from the Creek goes back into the Creek, although at a point downstream from the point of diversion.

X.

Any Conclusion of Law hereinafter recited which should be deemed a Finding of Fact is hereby adopted as such.

From these Findings the Pollution Control Hearings Board comes to these

CONCLUSIONS OF LAW

I.

Appellants did not identify any rights to their use of the water with which the respondents' diversion will interfere.

II.

The Department must, and did, prove that the appropriation will not detrimentally affect the public welfare. It need not affirmatively show that the appropriation is in the public interest or welfare.

III.

The Department has complied with chapter 90.54.020(3)(a) RCW by providing for a minimum flow of water of 0.25 cfs when there is that amount of water available in the stream at the point of diversion.

IV.

RCW 90.54.020(1) recognizes recreation and esthetics as beneficial uses of water.

FINDINGS OF FACT,
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V.

The Order of the Department was lawful, in accordance with the laws of the State of Washington, and should be affirmed.

VI.

Any Finding of Fact which should be deemed a Conclusion of Law is hereby adopted as such.

Therefore, the Pollution Control Hearings Board issues this

ORDER

The decision and Order of the Department is affirmed.

DATED this 3rd day of December, 1974.

POLLUTION CONTROL HEARINGS BOARD

W. A. Gissberg
W. A. GISSBERG, Member

Chris Smith
CHRIS SMITH, Member

FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER